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No. 96-1818

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our petition for a writ of certiorari, we explain that the courts of appeals are divided on an important issue of federal law—the proper scope of the "express advocacy" test first articulated by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The First Circuit concluded in this case that a Federal Election Commission regulation that concededly tracks the Ninth Circuit's analysis of "express advocacy" is invalid on its face. Respondents briefly deny that the courts of appeals are in fact divided on the question presented (Br. in Opp. 26-29), but they devote the bulk of their

submission to the proposition that the Commission wrongly has disregarded the teaching of *Buckley* and its progeny. Br. in Opp. 4-18, 21-24. Respondents are wrong to contend that there is no division of authority on the question presented, and their disagreement with the merits of the Commission's view is not a basis for precluding this Court's review.

1. As the district court noted in this case, the advertisements at issue in *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), "used none of *Buckley*'s prohibited words" (Pet App. 10a) but nonetheless were found to be "express advocacy" within *Buckley*'s purview. And the district court found it "obvious" that subsection (b) of the Commission's regulation (see 11 C.F.R. 100.22(b)) "comes directly from" the Ninth Circuit's analysis in *Furgatch*. Pet. App. 11a. The district court also emphasized that subsection (b) "appears to be a very reasonable attempt to deal with the[] vagaries of language." *Id.* at 12a. It was only because the district court agreed with respondents that "*Furgatch* and the resulting regulation go farther than *Buckley* and [its progeny] permit" that the district court was able to strike subsection (b) of the Commission's regulation as requested by respondents. *Id.* at 11a; see also *id.* at 15a (noting that *Furgatch* is "[d]irectly contrary to the First Circuit['s]" caselaw interpreting *Buckley* and its progeny). Because the First Circuit summarily affirmed the district court's decision invalidating subsection (b), the First Circuit clearly placed itself in conflict with the Ninth Circuit's understanding of "express advocacy."[1]

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[1] In the courts below, while making other arguments aimed at casting doubt on the persuasiveness of *Furgatch*'s analysis,

Indeed, respondents have not seriously attempted to demonstrate *how* the Ninth Circuit could agree with the First Circuit in this case while *Furgatch* remains on the books. The Ninth Circuit recognized in *Furgatch* that the advertisements there at issue "fail[ed] to state expressly the precise action called for" (807 F.2d at 865), but nonetheless concluded, consistent with the Commission's regulation, that consideration of all surrounding facts and circumstances would lead a reasonable observer only to the conclusion that the ads called for the defeat of President Carter in the 1980 election. Thus, while respondents in conclusory terms repeatedly dismiss the reasoning of *Furgatch* as "dicta" (*e.g.*, Br. in Opp. 15, 16-17, 26-27), they do not, and cannot, offer any cogent analysis of how the result in *Furgatch* can be squared with the restrictive interpretation of "express advocacy" that they successfully urged upon the courts below. In fact, as the district court noted, the ads at issue in "*Furgatch* * * * [are] precisely the type of communication" that the First Circuit's and respondents' interpretation of the law "would permit." Pet. App. 14a.[2]

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respondents in fact faulted the Commission for "promulgat-[ing] a[n] overbroad and vague regulation which adopts the 'minority' judicial position * * * and * * * giv[es] it the force of law throughout the United States." Pls.' Reply Memorandum to Def. Federal Election Commission's Memorandum of Points and Authorities 17; see also C.A. Brief for Appellees 46 ("*Furgatch* is alone, among the cases interpreting express advocacy, in failing to give that term a narrow, speech-protective construction").

[2] Even if respondents could articulate a theory of how the result in *Furgatch* can be squared with the law in the First Circuit, that would at most establish that the Ninth Circuit *could* have reached its result in some other way, *not* that the reasoning that the Ninth Circuit actually employed is "dicta."

Respondents also suggest (Br. in Opp. 28-29) that the decision below does not conflict with *Furgatch*, because *Furgatch* involved Sections 434(c) and 441d of FECA (2 U.S.C. 431 *et seq.*), whereas the decision below involves Section 441b of that statute. While those three sections address different issues raised by campaigns for federal public office, the "express advocacy" test is common to all three, and there is accordingly no sound reason why the meaning of "express advocacy" should change depending on which section is at issue. Compare *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (noting "basic canon" that a phrase used in various sections of the same statute "should bear the same meaning"). To the contrary, when this Court first held that the "express advocacy" test applies under Section 441b, it merely adopted the same test that *Buckley* had already crafted under the disclosure provisions that are now codified in Section 434(c). See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*). Similarly, in adopting the regulation at issue in this case, the Commission expressly rejected the notion that the meaning of "express advocacy" should change depending on which provision of FECA is at issue. See 60 Fed. Reg. 35,294.

2. Respondents also suggest that the Commission is somehow estopped from seeking review in this case, because ten years ago it opposed certiorari in *Furgatch*. Respondents quote several passages from the

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Compare *CFTC* v. *Dunn*, 58 F.3d 50 (2d Cir. 1995) ("a later panel [of a court of appeals] may not disregard the reasoning of a decision because an entirely different line of reasoning was available"; if that reasoning creates a conflict in the circuits, "[t]his conflict is for the Supreme Court, not us, to resolve"), rev'd on other grounds, 117 S. Ct. 913 (1997).

Commission's Brief in Opposition in *Furgatch* that respondents appear to view as inconsistent with the Commission's position in this case. See Br. in Opp. 17, 27. Those statements, however, are simply to the effect that *Furgatch* correctly understood the legal contours of the "express advocacy" requirement, and that this Court does not ordinarily sit to review whether specific facts meet a settled legal standard. The Commission continues to believe that *Furgatch* correctly understood and applied *Buckley*'s "express advocacy" test—as is demonstrated by the Commission's promulgation and defense of the regulation here at issue. Moreover, respondents brought this case as a facial challenge to 11 C.F.R. 100.22(b), and the judgment in their favor therefore necessarily reflects the First Circuit's view that there is *no conceivable set of circumstances* (including, presumably, those at issue in *Furgatch*) to which that regulation may validly be applied. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 300-301 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991). A holding of that breadth can scarcely be labeled "factbound" and accordingly the Commission's reliance on the factbound nature of the claim that was before this Court in *Furgatch* is in no way inconsistent with the petition in this case.

3. As we have shown in the petition (Pet. 12-15), the better reading of this Court's decisions in *Buckley* and *MCFL* is that the "express advocacy" test focuses on whether the electoral message is unambiguous, not on whether that message uses a word drawn from a list of "explicit" directives. Our petition is not answered by respondents' effort to set forth at length those passages from *Buckley* and *MCFL* that they believe support their more restrictive interpretation of "express advocacy." See, *e.g.*,

Br. in Opp. 6 & n.1, 11-12. Respondents' catalogue of quotations establishes only that respondents' restrictive interpretation is a conceivable reading of this Court's cases—a proposition that we have never disputed. Those quotations therefore may explain why the courts of appeals are divided. They do not provide a persuasive basis for this Court to forgo resolution of that disagreement on an important question of federal law.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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